85-1277

Supreme Court, U.S.
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Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE SCHOOL BOARD OF NASSAU COUNTY, FLORIDA; and CRAIG MARSH,
Individually and as Superintendent of Schools of Nassau County, Florida,

Petitioners,

---*vs.*---

GENE H. ARLINE,
Respondent.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED FOR REVIEW

1. Whether the contagious, infectious disease of Tuberculosis constitutes a handicap within the meaning of Title 29, U.S.C.A. 701, et seq. (Section 504, Rehabilitation Act of 1973).

2. Whether the receipt of miniscule Federal financial aid, i.e. less than three-tenths of one per cent of the entire budget, by a public employer pursuant to 20 U.S.C. Section 237 is sufficient to invoke jurisdiction under Title 29, U.S.C.A. 701, et seq. (Section 504, Rehabilitation Act of 1973.).

3. Whether the Eleventh Amendment to the United States Constitution bars an action against a school board in Florida, under Section 504, Rehabilitation Act of 1973.

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Gene H. Arline v. School Board of Nassau County, et al., 772 F.2d 759 (1985)

Eleventh Circuit

GROUNDS ON WHICH JURISDICTION IS INVOKED

On September 30, 1985, the Eleventh Circuit Court of Appeals reversed the Final Judgment of the District Court for the Middle District of Florida. Petition for Rehearing and Suggestion for Rehearing, En Banc, were denied on November 8, 1985.

This Court has jurisdiction in its discretion to grant a Writ of Certiorari because the Eleventh Circuit Court of Appeals, by its decision, has held for the first time that the provisions of Section 504, Rehabilitation Act, 29 U.S.C.A. 701, apply to contagious diseases including Tuberculosis. Further, the Court held that Federal impact aid, amounting to three-tenths of one percent of the School District's budget, is sufficient to render the entire school system subject to the provisions of the Act.

STATUTORY PROVISIONS BELIEVED TO CONFER ON THE SUPREME COURT JURISDICTION TO REVIEW THE JUDGEMENT BY WRIT OF CERTIORARI

1. 28 U.S.C.A. 1254
2. Rule 17(c), Supreme Court Rules

STATUTES (IN PERTINENT PARTS) CONSIDERED BY THE COURT BELOW AND WHICH BEAR SIGNIFICANCE TO THIS PETITION

29 U.S.C.A. 794, Section 504 Rehabilitation Act of 1973:

> No otherwise qualified handicapped individual...shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance..."

Amendment 11 Suits against States - Restriction of Judicial Power:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

20 U.S.C.A. 237:

> (a) Where the Commissioner, after consultation with any local educational agency and with the appropriate State educational agency, determines for any fiscal year ending prior to July 1, 1978-
>
> (1) that the United States owns Federal property in the school district of such local educational agency, and that such property (A) has been acquired by

the United States since 1938, (B) was not acquired by exchange for other Federal Property in the school district which the United States owned before 1939, and (C) had an assessed value (determined as of the time or times when so acquired) aggregating 10 per centum or more of the assessed value of all real property in the school district (similarly determined as of the time or times when such Federal property was so acquired); and

(2) that such acquisition has placed a substantial and continuing financial burden on such agency; and

(3) that such agency is not being substantially compensated for the loss in revenue resulting from such acquisition by increases in revenue accruing to the agency from the carrying on of Federal activities with respect to the property so acquired, then the local educational agency shall be entitled to receive for such fiscal year such amount as, in the judgment of the Commissioner, is equal to the continuing Federal responsibility for the additional financial burden with respect to current expenditures placed on such agency by such acquisition of property. Such amount shall not exceed the amount which, in the judgement of the Commissioner, such agency would have derived in such year, and would have had available for current expenditures, from the property acquired by the United States (such

amount to be determined without regard to any improvements or other changes made in or on such property since acquisition).

STATEMENT OF THE CASE

Petitioners were the defendants in an action brought by GENE H. ARLINE in United States District Court, Middle District of Florida, Jacksonville Division. Arline was a tenured teacher with the Nassau County School Board and was terminated because of her chronic susceptibility to infectious Tuberculosis. Prior to this action, she had unsuccessfully challenged the dismissal through the state courts of Florida.[1]

The cause came on for trial on November 17, 1983. The District Court heard the testimony of Dr. Marianne McEuen, M. D., a physician specializing in Tuberculosis, who testified that Respondent had been diagnosed as having Tuberculo[illegible]. She also described the characteristics of that disease. Her testimony established that Tuberculosis is an infectious disease which is capable of being transmitted from one individual to another by means of breathing, coughing, sneezing, or other respiratory activity. Dr. McEuen further testified that while young children are particularly susceptible to the disease, all persons are capable of contracting it when exposed to a person who is infectious. (App. E) Following the nonjury trial, John H. Moore, II, District Judge, ruled for the defendants on all issues. (See Appendix C) An appeal to the Eleventh Circuit Court of Appeals followed.

[1] School Board of Nassau County v. Arline, 408 So.2d 706 (Fla. 1st DCA 1982).

On appeal, the decision of the lower court was reversed. (See *Arline v. School Board of Nassau County,* 772 F.2d 759) In its reversal, the court found jurisdiction existed because the School Board received Federal impact aid funds and further found that Tuberculosis was a "handicap" within the meaning of *Section 504, Rehabilitation Act of 1973, 29 U.S.C.A. 701,* et seq. Petetition for Rehearing was timely filed and denied on November 8, 1985.

Oral argument on the case below was held on February 4, 1985. *Atascadero State Hospital v. Scanlon,* 87 L. Ed. 2d 171, was decided by this Court on June 28, 1985.

REASONS FOR GRANTING THE WRIT

POINT I

DOES THE CONTAGIOUS, INFECTIOUS DISEASE OF TUBERCULOSIS CONSTITUTE A HANDICAP WITHIN THE MEANING OF TITLE 29 U.S.C.A. 701, et. seq, (Section 504, Rehabilitation Act of 1973)

The Court of Appeals' decision below significantly extended the scope of Section 504 of the Rehabilitation Act of 1973 beyond that which had been established by previous decisional law. Because of the far-reaching implications of the Court of Appeals' decision, both in terms of what "programs or activities" are subject to the reach of Section 504, as well as the holding that individuals suffering from infectious, contagious diseases are "handicapped individuals" protected thereby, it is respectfully submitted that this Court should exercise its discretion to review the decision of the Court of Appeals and render a definitive ruling of the issues presented in this case.

Although the courts have admittedly construed the term "handicapped individual" as used in Section 504 in a broad manner so as to include individuals with a wide variety of physical and mental impairments,[1] no judicial decision prior to that of the Court of Appeals in the

[1] *See, e.g., Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (hearing impairments); *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981) (blindness); *Beutivegna v. U.S. Department of Labor*, 694 F.2d 619 (9th Cir. 1982) (diabetes); *Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983) (dyslexia); *Kling v. County of Los Angeles*, 633 F.2d 876 (9th Cir. 1980) (Crohn's disease); *Treadwell V. Alexander*, 707 F.2d 473 (11th Cir. 1983) (heart condition); *Doe v. Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d 1402 (5th Cir., 1983) (depression); *Gladys J. v. Pearland Ind. School Dist.*, 520 F. Supp. 869 (S.D. Tex. 1981) (schizophrenia); *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1978) (retardation).

instant case had ever construed that term as including an individual afflicted by a contagious disease. Thus, in holding that Respondent's Tuberculosis constituted a "handicap" within the meaning of the Act, the Court of Appeals did not rely on any prior decisional authority. Instead, the Court of Appeals focused on the definitions of a "handicapped individual" as contained in applicable statutes, 29 U.S.C Section 706(7)(B) and regulations, 45 C.F.R. Section 84.3(j). The Court of Appeals was of the view that Respondent's condition fell "so neatly within the statutory and regulatory framework" that it was obligated to hold that Respondent's Tuberculosis constituted a handicap unless there was an express "legislative direction" to the contrary. 772 F.2d at 763-64. Finding no such direction, the Court of Appeals held that Respondent's tuberculosis did constitute a "handicap" and that Respondent was thereby entitled to the protections of the Act.

The Court of Appeals' decision did not suggest that an employer subject to the Act could never make employment decisions on the basis of an individual's being afflicted with a contagious disease. Thus, the Court of Appeals' decision left open the possibility that such a disease might render the affected individual not "otherwise qualified" for particular jobs within the meaning of the Act. However, the Court of Appeals' decision requires that an employer must, prior to making such a determination, attempt to provide "reasonable accommodation" to the individual in an attempt to render the individual employable "in some . . . kind of position" with the employer. 772 F.2d at 764-65.

It is submitted that the Court of Appeals' decision in

this respect was based upon an erroneous view of the Act and would create disastrous consequences if widely applied to public and private employers subject to the Act. For one thing, the Court of Appeals' view that contagious diseases fit "neatly within" the statutory and regulatory framework is erroneous, insofar as these "frameworks," as well as all prior decisions construing them, appear to focus primarily upon conditions which render a person unable to perform the essential functions of a job, or which are perceived as having such an effect. Thus, the statute defines a "handicap" as a *"physical or mental impairment* which *substantially limits* one or more . . . *major life activities."* 29 U.S.C. Section 706(7)(B) (emphasis added). This definition clearly indicates that in proscribing employment discrimination against the handicapped, Congress was primarily concerned with individuals whose *mental or physical capabilities* rendered them unable to perform certain "routine" tasks or activities, or who were perceived or regarded as having such limited abilities. This court has said that the Act is intended to protect handicapped individuals who are qualified "in spite of" their handicaps. *Southeastern Community College v. Davis*, 442 U. S. 397, 406 (1976).

Further, whether an individual is to be considered as "qualified" under the Act depends on whether such individual can, with or without reasonable accommodation,

> *perform the essential functions* of the position in question *without endangering the health and safety* of the individual or others.

Prewitt v. United States Postal Service, 662 F.2d 292, 310 (5th Cir. 1981) (emphasis added). Thus, it is clear that the primary emphasis of the statutory and regulatory definitions of a "handicapped individual" is upon persons with impaired *physical or mental abilities*, while the same authorities define a "qualified handicapped individual" as one who is *able* to safely and adequately perform the requirements of a job *despite* his handicap.

Similarly, prior case law regarding the sort of "reasonable accommodation" that is required of an employer also indicate an intention to limit the concept of a "handicap" to conditions which restrict an individual's ability to function in a job or other "activity." Thus, the concept of "reasonable accommodation" has principally been applied in the sense of requiring an employer to *restructure the requirements* of the job (or environment in which the job is to be performed) so that the handicapped individual might be better able to satisfy those requirements. *See*, 45 *C.F.R.* Section 84.12(b); *Gardner v. Morris*, 752 F.2d 1271, 1280 (8th Cir. 1985).

In short, contrary to the views of the Court of Appeals below, the "statutory and regulatory" framework of the Act, as well as the cases previously construing the Act, have limited the concept of a "handicap" to physical and mental conditions which result in either a real or perceived diminution of an individual's capabilities. These authorities require an employer to make reasonable efforts to accomodate the requirements of a job to a handicapped individual's abilities, and to treat in a nondiscriminatory fashion those individuals who are able, either with or

without such accommodation, to perform the requirements of the job without endangering themselves or others.

The decision of the Court of Appeals below, by holding that a contagious disease is, without more, a "handicap," has undertaken a radical departure from all previous interpretations of the statutory and regulatory framework. The policy considerations involved in the context of a contagious disease differ markedly from those involved in the case of most "handicaps." For one thing, an individual suffering from a contagious disease may not necessarily suffer from any physical or mental impairments affecting his ability to perform the job in question. In other words, an employer's reluctance to hire such an individual is not due to any real or perceived inability on the individuals' part, but rather because of the employer's reluctance to expose its other employees and its clientele to the threat of infection.

Admittedly, safety considerations may also be involved in the case of a handicapped individual with physical or mental limitations. However, *the "danger" in such cases arises from the handicapped individual's inability to perform the requirements of the job.* Where "reasonable accommodation" can result in the individual being better able to fulfill the job requirements (as modified), then the individual may be fairly considered as fully "qualified" for the job, and thus entitled to the protection of the Act.

However, in the case of individuals with contagious diseases, such as Respondent, the safety considerations are

quite different. They arise not from any inability (real or perceived) of the handicapped individual to perform the essential functions of the job, but instead from that individual's mere presence on the job site. Thus, the danger cannot be eliminated or minimized through "reasonable accommodation" in the form of requirements of the job, because the danger in such cases does not arise from the handicapped individual's inability to perform those requirements in the first place.

Indeed, the decision of the Court of Appeals below seems to contemplate a different sort of attempt to "reasonably accommodate" Respondent. The Court of Appeals indicated that even if Respondent were not "otherwise qualified" for her elementary school teaching position (due to the safety considerations involved) it might nevertheless be possible to "accommodate" her by placing her in "some other kind of position" in which she would be exposed to "less susceptible individuals." 772 F.2d at 765.

It is submitted that Congress never contemplated such an "accommodation" whereby an employer is required to pick and choose from among its employees those to whom it is "acceptable" to expose to a such health risks. The sort of accommodation suggested by the Court of Appeals could never result in a total elimination of the health risks, but would only achieve a shifting of that risk from one group of persons to another. Futher, it could never be known with certainty whether such an "accommodation" was successful in eliminating the risk of

spreading a contagious disease unless and until someone else contracted the disease.

The concept of "reasonable accommodation" in the context of handicapped individuals with impaired physical or mental abilities represents an attempt to achieve a compromise between the legitimate interests of employers and other recipients of federal funds subject to the Act, and the objective of Congress to integrate handicapped individuals into the mainstream of society when possible. However, this court has stated that the duty of reasonable accommodation does not obligate a recipient of federal funds to make "fundamental" or "substantial" modifications to its programs which would "compromise the essential nature" of the program. *Alexander v. Choate*, U.S. , 105 S. Ct. 712, 720 (1985) *citing*, *Southeastern Comminuty College v. Davis*, 442 U.S. 397 (1979). The decision of the Court of Appeals in this case imposes precisely such an obligation, by demanding a form of "accommodation" which requires the Petitioner School Board to disregard the very health risk which led to its reluctance to continue Respondent's employment in the first place.

There is no indication in the statutory framework of the Act which indicates that Congress intended to require federal recipients subject to the Act to compromise the health and safety of their non-handicapped employees by attempting to accommodate those who cannot be safely and fully accommodated. To the contrary, Congress in one instance chose to specifically exclude from the definition of "handicapped individuals" alcoholics and drug

abusers whose current use of alcohol or drugs would constitute a direct threat to the safety of others. 29 U.S.C. Section 706(7)(B). (Such individuals, it should be observed, are similar to persons with contagious diseases insofar as the threat presented by alcoholics or drug abusers is unavoidable to the extent that such individuals are unwilling to cooperate in their own treatment.) The Court of Appeals, however, did not view this exemption as evidencing a Congressional intent to exclude from the coverage of the Act individuals with contagious diseases (who also present health risk which are not entirely avoidable), but to the contrary, found that Congress' failure to specifically exclude contagious diseases at the same time it dealt with alcoholics and drug abusers implied that Congress "harbored no similar disapproval" about contagious diseases. 772 F.2d at 764.

This view overlooks the fact that, in enacting the 1978 amendments to the Act [29 U.S.C. Section 706(7)(B)] which excluded alcoholics and drug abusers (Pub. L. No. 95-602, Section 122), Congress was obviously reacting specifically to a 1977 Attorney General's Opinion which had indicated that alcoholics and drug abusers were "handicapped individuals" within the meaning of the Act. 43 Op. Att'y Gen. 12 (1977). Thus, contrary to the Court of Appeals' view, the exclusion of alcoholics and drug abusers does indicate a Congressional reluctance to require employers to accommodate those whose handicap cannot be safely accommodated, and Congress' failure to specifically exclude contagious diseases from the definition of a handicap should properly be viewed in the

perspective of its reaction to a specific need.

In short, the Court of Appeals' decision that individuals with contagious diseases are "handicapped individuals" protected by the Act constitutes a dramatic expansion of the scope of the Act beyond its literal terms as well as prior judicial decisions construing it. The decision of the Court of Appeals has far-reaching implications insofar as it constitutes a precedent that all individuals with any form of contagious disease (including Acquired Immune Deficiency Syndrome and other fatal diseases) are protected by the Act. Further, the concept of "reasonable accommodation" expressed in the Court of Appeals' decision would require employers subject to the Act to compromise the safety of their employees and clientele by exposing some of those persons to the threat of contracting contagious diseases whenever the risk of contracting such disease may be characterized as "minimal," and thus presumably "acceptable." It is respectfully submitted that this Court should accept jurisdiction of this case in order to issue a definitive ruling as to whether an individual who has been shown to be suffering from a contagious disease, which is capable of being spread to anyone, is in fact a "handicapped individual" within the meaning of the Act.

POINT II

IS THE RECEIPT OF MINISCULE FEDERAL FINANCIAL AID, i.e. LESS THAN THREE-TENTHS OF ONE PER CENT OF THE ENTIRE BUDGET, BY A PUBLIC EMPLOYER PURSUANT TO 20 U.S.C. SECTION 237 SUFFICIENT TO INVOKE JURISDICTION UNDER TITLE 29, U.S.C.A. 701, et seq. (Section 504, Rehabilitaion Act of 1973.)

The decision of the Court of Appeals merits this Court's review in another respect. The Court of Appeals' decision that the "impact aid" received by the Petitioner School Board (although amounting to only 0.3% of its entire budget) was sufficient to render *all* of the Board's activites subject to Section 504 coverage constitutes a dramatic expansion of the concept of "Federal financial aid" over that expressed in previous decisions construing Section 504 and similar statutes. This aspect of the Court of Appeals' decision, if allowed to stand, would result in subjecting a substantial number of school districts to Section 504 coverage, even though the "impact aid" received by such districts may be miniscule (as in the present case), and even though such aid is not provided in order to finance any particular "program or activity," but instead consist of non-earmarked funds provided in order to compensate the school district for local taxation revenues it has lost as a result of tax-exempt federal land in the district. 20 U.S.C. Section 237.

This Court has held that coverage under Section 504 is program-specific. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 104 S.Ct. 1248, 1255 (1984). Further, this Court has indicated that under Title IX, which contains the same "program or activity" coverage as Section 504, the fact that federal funds issued for one purpose ultimately find their way into a budget which funds a separate and

distict "program or activity" is not sufficient to subject that program or activity to Title IX coverage. *Grove City College v. Bell,* U.S. , 104 S.Ct. 1211, 1221 (1984).

The provisions of 20 U.S.C. Section 237 make it abundantly clear that the purpose of "impact aid" under that statute is to compensate local school districts for local tax revenues the districts have lost due to the presence of tax-exempt, federally owned land in the district. Several cases have held that payments made by the federal government to compensate an entity for obligations it has incurred while acting on behalf of the federal government do not constitute "Federal financial assistance" within the meaning of Section 504. *Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202, 1209 (9th Cir. 1984) ("compensatory" payments under contract for carriage of mail); *Hingson V. Pacific Southwest Airlines,* 743 F.2d 1408, 1414 (9th Cir. 1984) (same); *Ferris v. University of Texas at Austin,* 558 F.Supp. 536, 543 (W.D. Tex. 1983) (unrestricted funds intended to compensate university for costs incurred in administering federally-funded programs did not constitute "Federal financial assistance" to other programs, even though commingled with student service fees in university's general operating budget). Yet the Court of Appeals in the instant case reached a contrary result, holding that the "impact aid" did constitute "Federal financial assistance" sufficient to trigger Section 504 coverage, notwithstanding its compensatory purpose. This is the first decision to so characterize impact aid as "financial assistance" for Section 504 purposes, and accordingly

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would significantly expand the scope of Section 504 coverage over that established by prior case law, since a substantial percentage of the nation's school districts receive impact aid in some amount.

Had Congress chosen to do so, it could have provided that *all employers* whose businesses "affected" interstate commerce would be subject to compliance with Section 504. However, Congress deliberately chose not to provide such expansive coverage for Section 504, but instead limited its application to "program[s] or activit[ies] receiving Federal financial assistance." This decision, it is submitted, reflects a Congressional intention that Section 504 coverage should not extend to every case in which an employer may receive federal funds, but should instead be based upon a sort of contractual understanding. Thus, when the federal government grants funds to a local government or a private entity for the purpose of financing a particular program or activity, and the recipient of the funds willingly accepts them, then Section 504 coverage is properly imposed on the program or activity receiving the funds because both parties fully understood that the receipt of the funds would lead to coverage. Where, however, the federal government (as in this case) provides non-earmarked "replacement dollars" to compensate a school district for revenues it has lost as a result of federal ownership of property in the district, and allows the district to use those funds wherever it sees fit to do so, the district has never been given fair notice that it will be subject to Section 504 coverage, nor has it agreed to be so covered.

The Court of Appeals' finding that impact aid is sufficient to trigger Section 504 coverage is unrealistic in another sense as well. If, as the Court of Appeals held, the acceptance of such aid gives rise to a duty to act in compliance with Section 504, then this duty could be avoided by the simple expedient of a school district's declining to accept the federally-funded monies. Thus, it is unrealistic to assume that Congress would have relied upon the acceptance of impact aid as a mechanism for compelling compliance with Section 504, because a school district would have the unilateral power to avoid such compliance by the simple device of deciding to forego the aid. *See, Paralyzed Veterans of America v. Civil Aeronautics Board,* 752 F.2d 694, 709 (D.C. Cir.), *cert. granted,* U.S. , 54 U.S.L.W. 3262 (Oct. 21, 1985). A substantial number of school districts would opt for such an alternative, it is believed, should the decision of the Court of Appeals below be allowed to stand.

The Court of Appeals' holding would have the effect of simply subjecting *all activities* of such school districts to Section 504 coverage, contrary to this court's mandate that the Act be construed in a program-specific manner. *Consolidated Rail Corp. v. Darrone, supra.* As indicated earlier, this court has recently agreed to review a Court of Appeals decision which appears to have diverged from that mandate, *Paralyzed Veterans of America v. Civil Aeronautics Board, supra,* and it is respectfully urged that the Court should do so again in order to review the decision of the Court of Appeals in the instant case.

POINT III

IS THE SCHOOL BOARD IMMUNE UNDER THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO AN ACTION BROUGHT IN FEDERAL COURT UNDER THE REHABILITATION ACT OF 1973

Subsequent to the decision by the trial court on November 17, 1983, and subsequent to oral argument and briefing before the Eleventh Circuit, this Court decided the case of *Atascadero State Hospital v. Scanlon*, 87 L. Ed 2d 171, on June 28, 1985. In that case, the Court held that absent a state's consent to waive its constitutional immunity and absent unequivocal congressional intention, the Eleventh Amendment bars suits in Federal Court against states. A District School Board in Florida is a direct branch of the State of Florida because of the unique funding scheme existing in Florida. (See *Adkins v. Duval County School Board*, 511 F.2d 690 CA5.)

Clearly, neither the parties nor the trial court below had the benefit of *Atascadero*, supra, at the time this case was tried. Nor is *Atascadero*, supra, included in the Brief on appeal because of the chronology previously referred to, although the Eleventh Circuit Court of Appeals, prior to denial of rehearing, was made aware of *Atascadero*, supra, by counsel for Petitioner. (See Appendix D) The Court's pronouncement in the *Atascadero*, supra, case clearly bars the instant action against the School Board.

Petitioners are not unaware of the case of *Campbell v. Gadsden County District School Board*, 534 F.2d 650 (5th DCA, 1976). However, since the issue of whether or

not a state agency has Eleventh Amendment immunity is a question of fact, Petitioners suggest the Court, if certiorari is granted, should remand this matter to the District Court for an evidentiary hearing to determine who would pay any sums found to be due. If, indeed, the funds to defray such an award would be derived from the state treasury, in that event, Petitioners suggest the *Atascadero*, supra, rationale would bar this claim. See *Adams v. Rankin County Board of Education*, 524 F.2d 928, (5th Cir., 1975).

In conclusion, Petitioners suggest that certiorari should be granted and this cause remanded to the District Court for an evidentiary hearing and briefing to determine to applicability of the *Atascadero*, supra, holdings to the facts in the instant case.

Respectfully Submitted

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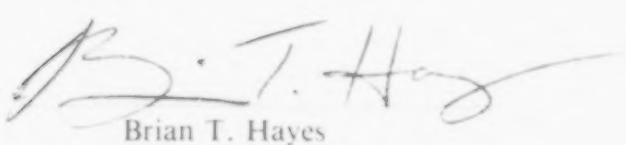
By 
Brian T. Hayes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petition For Writ Of Certiorari was furnished by U. S. mail to Steven H. Malone, Attorney for the Respondent this 27th day of January, 1986.

Brian T. Hayes

Appendix A

ARLINE v. SCHOOL BD. OF NASSAU COUNTY

Gene H. ARLINE, Plaintiff-Appellant,

v.

The SCHOOL BOARD OF NASSAU COUNTY: and Craig Marsh, Individually and as Superintendent of Schools of Nassau County, FL., Defendants-Appellee.

Nos. 83-3754, 84-3307.

United States Court of Appeals,
Eleventh Circuit,
Sept. 30, 1985.

(Syllabus Omitted)

VANCE Circuit Judge:

In enacting the Rehabilitation act of 1973, Congress designed a comprehensive federal program aimed at integrating the handicapped into this society and affording them greater access to its benefits. One of the enforcement mechanisims of that Act is the private right of action[1] which arises out of its antidiscrimination provision. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, provides that.

> No otherwise qualified handicapped individual...shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...

[1] This court has concluded that section 504 creates a private right of action. *Jones v. Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376, 1377 n. 1 (11th Cir.1982), cert. denied, — U.S. — , 104 S.Ct. 1591, 80 L.Ed.2d 123 (1984).

Appendix A

In the appeal before us the plaintiff, a third grade teacher who was fired from her job solely because of her susceptibility to tuberculosis, alleges that her dismissal violated section 504. Our consideration of her claim requires us to construe the meaning of three essential terms in section 504, namely, "handicapped individual," "otherwise qualified"[2] and "federal financial assistance."

I

Mrs. Gene Arline first contracted tuberculosis in 1957 at the age of fourteen after which the disease went into remission. In 1966 she was hired as an elementary school teacher in Nassau County, Florida, and did her job competently for thirteen years. Arline then suffered three relapses of tuberculosis, one in 1977 and two in 1978. After her third relapse the School Board dismissed Arline from her job.

After being denied relief in state administrative proceedings, Arline brought suit in federal court alleging that her dismissal constituted a violation of section 504 of the Rehabilitation Act.[3] She contended that her susceptibility to tuberculosis made her a "handicapped individual" within the meaning of the Rehabilitation Act, and that the school board therefore violated section 504 because it had fired her even though she was "otherwise qualified if given

[2]The regulations promulgated under section 504 have limited the broad scope of the phrase "otherwise qualified" to cover handicapped persons who would be qualified for a specific job if given "reasonable accommodation" by the employer. *See* 45 C.F.R. Section 84.3(k)(l). For futher discussion, see part IV *infra*.

[3]The plaintiff also brought a claim under 42 U.S.C. Section 1983, alleging that she was denied due process under the fourteenth amendment. We reject this argument on the grounds articulated by the district court in its oral opinion:

> The plaintiff had at least one hearing and then a second hearing before the school board, then had a hearing before the Board of Education, State Board of Education, and then the matter was appealed pursuant to the administrative practices act of the State of Florida, chapter 120 of the Florida Statute, and the First District Court of Appeal ruled against her. In doing so, the Court of Appeal discussed the contract issue that was involved there and gave an interpretation of the contract provision, which provided that...the contract was continuing unless the individual who had executed the contract was unable to perform duties because of illness.
> ...I see no denial of due process, either procedural or substantive with regard to that decision or the action of the school board of Nassau County in that respect.

reasonable accommodation." Arline's first theory was that her handicap created no barrier at all to her continued employment because the risk that she would infect her students was so minimal. The descision to dismiss her because of it was thus unreasonable and discriminatory. In the alternative, she claimed that even if nonsusceptibility to tuberculosis was a necessary physical qualification for teaching small children, the school district should have offered her "reasonable accommodation" in the form of an administrative job or a temporary position teaching less susceptible persons such as older students or adults until she could obtain certification in areas outside elementary education.[4]

Along with medical evidence to support her claims, Arline introduced evidence that the school system received two forms of federal assistance. The first source of federal funds was Title I of the Elementary and Secondary Education Act, 20 U.S.C. Sections 2701-2854,[5] which provided monies to schools attended by significant numbers of children from low-income families. Although those funds were segregated from the general budget and used to pay only Title I teachers' salaries and purchase only Title I program supplies, she pointed out that her job entailed significant involvement with the Title I program in the form of day-to-day conferrals with Title I teachers about those of her students who were involved in the program. The second form of federal funding was "impact aid," which is provided to school systems whose populations have been substantially enlarged by the attendance of federal employees' children, but which have reduced tax revenues due to the presence of federally-owned property

[4]The district court found that the school board had a policy which permitted an individual to work out of field or out of certification for a period of time while he was attempting to obtain certification in that field.

[5]The Title I program has now been superseded by Chapter I of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. Sections 3801-3876.

in the district. 20 U.S.C. Section 237. Although such funds constituted only a small portion of the school system's budget,[6] the defendants conceded that it was added to the school system's general education fund, from which teachers' salaries were paid.

After trial, the district court issued an oral opinion which found for the defendants on all counts. First, the court found that a contagious disease such as tuberculosis is not a "handicap" within the meaning of the Rehabilitation Act. As to her contention that she should have been given another position, the court concluded that Arline lacked the qualifications to teach outside of elementary education. In any case, the court held, the school board had no obligation to afford Arline alternative positions because it had an overriding duty to protect the public from contagious diseases.[7] Finally, the court concluded that neither the Title I funding nor the impact aid met the "federal financial assistance" requirement of section 504. With regard to the Title I money, the court stated that Arline was not a beneficiary of the funds because she was "not employed for purposes of Title I or in the Title I program..." As for the impact aid, the court concluded that it did not constitute "federal financial assistance" within the meaning of section 504.

II

Because of its jurisdictional implications, we first consider whether the defendant received any "federal financial assistance" within the meaning of section 504. We need not address the effect of the Title I funding, for

[6] Testimony by the school board's superintendent established that in 1978-79 the system received $39,000 in impact aid, or approximately 0.3 percent of the entire school budget.

[7] The court did not make clear whether it believed that the absence of such an obligation on the part of the school board resulted from its conclusion that tuberculosis is not a handicap; or whether, assuming that tuberculosis is a handicap, her susceptibility to it precluded Arline from being a person "otherwise qualified" for any teaching position; or finally, whether the school board's duty to afford "reasonable accommodation" did not extend to affording the relief she requested.

we find that the impact aid given to the defendants qualifies as "federal financial assistance" under section 504.

[1] As this court noted in *Jones v. Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376, 1379 (11th Cir.1982), *cert. denied*, — U.S. —, 104 S.Ct. 1591, 80 L.Ed.2d 123 (1984), "[o]n its face... [section 504] applies to programs receiving federal financial aid *of any kind*" (emphasis supplied).* *See also Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, —, 104 S.Ct. 1248, 1253, 79 L.Ed.2d 568 (1984). Where the language of a statute is not ambiguous and does not lead to absurd results, the job of the courts is to apply it as written.

[2,3] The court below concluded and the defendants now contend, however, that the application of the statute is not so straightforward as its language would suggest. First, they find ambiguity in the term "federal financial assistance," and argue that the nature of federal impact aid is such that it could not have been within Congress' contemplation as a means of triggering the enforcement provision in section 504. Defendants' rationale is that impact aid is, as a matter of definition, not "assistance." They posit that it is more analogous to land taxes than to federal assistance since it is calculated on the basis of federal ownership of land and serves as a substitute for tax payments that the school system would receive had the land in its area been privately owned. We agree that when

*Congress' failure to limit the scope of section 504 with any qualifying language was not an oversight, as evidenced by the contrast between that provision and Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000d-1 to -6, an analogous civil rights statute which Congress clearly had in mind during the passage of the Rehabilitation Act and its amendments. *See* S.Rep. No. 1297, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.Code Cong. & Ad.News 6373, 6390. Title VI prohibits race discrimination in employment. Section 604 of Title VI, 42 U.S.C. Section 604 of Title VI, 42 U.S.C. Section 2000d-3, limits the enforcement of anti-race discrimination provisions of Section 601 to those situations in which "a primary objective of the Federal financial assistance is to provide employment." Section 504 includes neither the "primary objective" limitation nor any other. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, — , 104 S.Ct. 1248, 1253-54(1984). We would be acting beyond our authority to read into section 504 limitations which Congress chose not to establish when it clearly could have done so.

the federal government makes payments for obligations incurred as a market participant such payments do not constitute "federal assistance." *see, e.g., Hingson v. Pacific Southwest Airlines,* 743 F.2d 1408, 1414 (9th Cir.1984) (payments under contracts to carry mail); *Jacobson v. Delta Airlines,* 742 F.2d 1202, 1209 (9th Cir. 1984) (same), *cert. dismissed,* — U.S. —, 105 S.Ct. 2129, 85 L.Ed.2d 493 (1985). *See also Darrone,* 465 U.S. at —, 104 S.Ct. at 1256 n. 19. We must, however, reject the defendants' analogies to obligatory tax payments as fatally flawed. The indisputable fact is that the federal government's exemption from local taxes left it with no legal obligation to give impact aid. Its choice to assist local entities that happen to bear particularly heavy burdens because of this exemption renders its assistance no less a subsidy than any other form of aid that it dispenses. As such, it is federal financial assistance within the broad meaning that Congress intentionally gave the term in section 504.[9]

[4] We also find no merit in defendants' argument that the plaintiff failed to show that the impact aid funded a "program or activity" in which she was employed. Under their theory, it was not sufficient for plaintiff to show that the impact funds were non-earmarked monies which were deposited into the school board's general

[9] As the fifth circuit recently explained in its exhaustive analysis of the legislative history of both section 504 and the analogous civil rights statutes expressly incorporated by it, Congress' "single overriding purpose" was to ensure that the funds of the United States were not used to support discriminatory practices. *United States v. Baylor University Medical Center,* 736 F.2d 1039, 1042-43 (5th Cir. 1984), *cert. denied,* — U.S. —, 105 S.Ct. 958, 83 L.Ed.2d 964 (1985). To this end, Congress intentionally gave broad scope to the term "federal financial assistance" in section 504. As this court pointed out in *Jones* "the legislative history to the 1974 amendments is replete with notations indicating that Section 504 was intended to encompass programs receiving federal financial assistance of any kind..." 681 F.2d at 1379-80. Recognizing the overall goal involved, the Surpreme Court has rejected attempts to read limitations into the term which are not apparent on the face of section 504. *Darrone,* 465 U.S. at —, 104 S.Ct. at 1253-55. *See also Grove City College v. Bell,* 465 U. S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984) (interpreting "federal financial assistance" under Title IX). We too conclude that since impact aid does not fall within any specifically delineated exception to the statute, it must be defined as "federal financial assistance" in order to give effect to the broad legislative intent expressed in section 504.

revenue fund to be used as it saw fit and that her salary was paid out of that fund. They argue that she must also show that the impact monies were actually used to fund her salary, since "the School Board might have elected to use those funds to pay for a program which would have had to be eliminated if the impact funds had been cut off." This argument strains credulity. Such a theory would impose on the plaintiff the impossible burden of tracing money that is virtually untraceable under accounting procedures which commingle funds in a general account before outlays are made. It also misconceives the relevant "program" in this case. We hold that the relevant "program" with regard to these nonearmarked general revenue funds is the entire school system. Once the federal money was deposited into its general fund, all activities paid for out of that fund became subject to section 504.

III

We must next determine whether tuberculosis constitutes a "handicap" within the meaning of the Rehabilitation Act. The district court concluded that it did not, explaining that "it's difficult for this court to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person..." We look first to the language of the statute in deciding whether the court has given a proper construction to the term.[10] Second, we take guidance from the construction given by the agency entrusted with the statute's enforcement. Regulations promulgated by the Department of

[10] 29 U.S.C. Section 706(7)(B) states that:

> Subject to the second sentence of this subparagraph, the term "handicapped individual" means...any individual who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Health and Human Services, 45 C.F.R. Section 84.3, give further definition to all of the relevant terms of section 504.[11]

[5] The language of these provisions in every respect supports a conclusion that persons with contagious diseases are within the coverage of section 504. As the record in this case makes clear, a person with tuberculosis is, when afflicted with the disease, one who "has a physical or mental impairment which substantially limits...major life activities," 29 U.S.C. Section 706(7)(B); 45 C.F.R. Section 84.3(j)(2)(i)(A), since the disease can significantly impair respiratory functions as well as other major body systems. Even when not directly affected by tuberculosis, Arline falls within the coverage of section 504 because she "has a record of such an impairment," 45 U.S.C. Section 84.3(j)(2)(iii), and "is regarded as having such an impairment," 45 U.S.C. Section 84.4(j)(2)(iv), by her employer. When a fact pattern falls so neatly within the statutory and regulatory framework, and when coverage would so clearly serve to promote Congress' intent to reduce instances of unthinking and unnecessary discrimination against those who are

[11] 45 C.F.R. Section 84.3(j)(2) provides:

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

the focus of the statute's concern, we would be hard pressed to find an exemption without further legislative direction.

As far as we can tell, there is no such legislative direction. Though the district court apparently thought it illogical to conclude that Congress would have placed contagious diseases within the definition of "handicaps" there is no objective evidence to support this conclusion. Neither the regulations nor the statutory language give any indication that chronic contagious diseases are to be excluded from the definition of "handicap." To the extent that the statute and regulations express any intent to limit the scope of section 504, Congress' failure to exclude contagious diseases from coverage when it specifically excluded alcoholism and drug abuse implies that it harbored no similar disapproval about them. We would as a general matter be reluctant to create an exemption where there is not a scintilla of evidence that Congress had any intention of doing so. We are especially reluctant in a situation where, as here, identifying an exemption would free recipients of federal funds from any duty even to consider whether reasonable accommodation could be made to those afflicted with contagious diseases. Such a result would, in our view, subvert Congress' intent to encourage recipients of federal funds to make decisions about the employability of those with physical or mental impairments only after a careful and informed weighing of the costs involved in accommodating the tasks at issue to their capabilities. This case, we believe, is precisely the kind in which that weighing process should have been made. We turn next to the the district court's conclusion that the school board did in fact give Arline proper consideration.

IV

[6,7] The law has recognized that not every handicapped individual can be integrated into every aspect of society in a cost-efficient manner. The regulations promulgated pursuant to section 504 therefore limit its applicability to

situations where the handicapped individual would be "otherwise qualified" if given "reasonable accomodation." *See Southeastern Community College v. Davis*, 442 U.S. 397, 410-13, 99 S.Ct. 2361, 2369-70, 60 L.Ed.2d 980 (1979); 45 C.F.R. Sections 84.3(k)(1), 84.12. While legitimate physical qualifications may be essential to the performance of certain jobs, *see* 442 U.S. at 406-07, 99 S.Ct. at 2367, both that determination and the determination of whether accommodation is possible are fact-specific issues. The court is obligated to scrutinize the evidence before determining whether the defendant's justifications reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice. *See, e.g., Strathie v. Department of Transportation*, 716 F.2d 227 (3d Cir.1983); *New York State Association for Retarded Children v. Carey*, 612 F.2d 644 (2d Cir.1979). In this case, the district court made no findings resolving the numerous factual disputes as to whether the risks entailed in retaining Arline in her elementary school position precluded her from having the necessary physical qualifications for the job, whether the same would be true if she were transferred to a position teaching less susceptible individuals, or whether the costs involved in accommodating her would place undue burdens on the school system.[12] Rather, it simply concluded that the school board was exempt from any duty whatever to weigh the actual costs and risks involved in accommodating Arline because of an overriding "duty to the public it serves." Section 504 by its existence establishes that such a duty cannot be used to shield an entity from liability for making decisions which "arbitrarily deprive genuinely qualified

[12] We recognize that the outcome in this case, as in Title VII cases, may depend on the allocation of burdens of persuasion or production. *See Doe v. New York University*, 666 F.2d 761, 776-77 (2d Cir.1981); *Prewitt v. United States Postal Service*, 662 F.2d 292, 307-10 (5th Cir. Unit A 1981). Because neither party has briefed this issue, however, we decline to address it.

handicapped persons of the opportunity to participate in a covered program." *Southeastern Community College*, 442 U.S. at 412, 99 S.Ct. at 2370. We therefore remand this case for futher findings[13] as to whether the risks of infection precluded Mrs. Arline from being "otherwise qualified" for her job and if so whether it was possible to make some reasonable accommodation for her in that teaching position, in another position teaching less susceptible individuals, or in some other kind of position in the school system.[14]

REVERSED and REMANDED.

[13] The court may at its option hold further evidentiary hearings if it deems them necessary. *See also* 29 C.F.R. Section 1613.704 (discussing factors for consideration in determining "reasonable accomodation"); *Prewitt*, 662 F.2d at 309 (same).

[14] Defendants' cross-appeal alleges error in the court's refusal to grant them attorneys' fees as prevailing parties under 29 U.S.C. Section 794a(b). We affirm this aspect of the court's holding.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3754

GENE H. ARLINE,

Plaintiff-Appellant,

versus

THE SCHOOL BOARD OF NASSAU COUNTY: and CRAIG MARSH, Individually and as Superintendent of Schools of Nassau, County, Fla.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 30, 1985, 11 Cir., 198 , F.2d).

(NOV 8 1985)

Before Vance and Anderson, Circuit Judges, and Henley*, Senior Circuit Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellant Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

(s) Robert Vance

United States Circuit Judge

*Hon. J. Smith Henley, U. S. Circuit Judge for the Eight Circuit, sitting by designation.

THE COURT: All right. Gentlemen, I appreciate -- and ladies, I appreciate your coming back here. The Court is prepared to rule on this case at this time, and will recite the findings of fact in the record.

First of all, obviously the Court finds that the plaintiff, Gene H. Arline, was an employee of the Nassau County Board of Public Instruction on a continuing contract basis and that she had tenure. The complaint in this case is in two counts, and I'll deal with the second count first, that is, the count for denial of -- under color of state law, of civil rights, pursuant to section 1983. In that count the plaintiff contends that she was denied due process under 42 U.S. Code 1983. Having reviewed the file and heard the testimony here, the Court is of the opinion that there is no denial of either substantive or procedural due process. The plaintiff had at least one hearing and then a second hearing before the school board, then had a hearing before the Board of Education, State Board of Education, and the the matter was appealed pursuant to the administrative practices act of the State of Florida, chapter 120 of the Florida Statute, and the First District Court of Appeal ruled against her. In doing so, the Court of appeal discussed the contract issue that was involved there and an interpretation of the contract provision, which provided that -- if I could find it -- the contract was continuing unless the individual who had executed the contract was unable to perform duties because of illness.

Seems to this Court that that decision of the First District Court of Appeal is final and that I cannot disturb

that, and I see no denial of due process, either procedural or substantive, with regard to that decision or the action of the school board of Nassau County in that respect.

Now, dealing with the first count, that is, the count under 29 United States Code, Section 794. Appears to be no question that all of the courts which have dealt with this particular statute say that Congress intended and provided for a right of private action or private right of action for individuals who are otherwise qualified, handicapped persons, and who are not afforded the remedies and the procedures and the rights of a handicapped individual pursuant to that act. In this regard we have to look at the plaintiff and, first of all, decide whether she is in fact a handicapped person under the terms of that statute. And the Court hereby finds that she is not such a handicapped person. No question that she suffers a handicap and it is most unfortunate that she suffers or did suffer from this particular infectious tuberculosis, but it's difficult for this Court to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person as that act has been implemented and decided by the various courts. I'm aware that the courts have held that alcoholism, cancer, blindness, various other things have -- mental retardation, various other things, have been determined to be handicapped persons, but it's just the Court's opinion that an infectious disease such as the plaintiff in this case had, in my opinion, does not fall within that handicapped definition. But even assuming that it did fall within that definition, then we have to look to see whether or not she is otherwise qualified. And the Court finds that she was not qualified to teach in other than elementary education. And although the school

board has a local policy which does permit working out of field or out of certification for a period of time while an individual is attempting to obtain certification in the particular field in which she is working out of, there is no obligation on the part of the school to do so.

Thirdly, the school board has a duty to the public which it serves, and although the risk may be less if the plaintiff were employed in teaching adults or older students who move from classroom to classroom, I cannot believe that Congress intended that school boards should not look out for the very public which it serves and would intend that a school board would keep someone in the employ who, unfortunately, suffered from such an infectious or contagious disease.

Finally, assuming the Court is incorrect in all those respects, the Court has reviewed the cases of Brown versus Sibley, 650 Fed 2d 760, a Fifth Circuit Court of Appeals case in 1981, and also the Doyle case, of which I'll give you the citation in just a minute, Doyle versus University of Alabama in Birmingham, 680 Fed 2d 1323. While those cases are not directly on point, the Brown -- rather, the Doyle case was specifically referred to by the Court, the Eleventh Circuit Court of Appeals, in their August 6, 1982 opinion in Jones versus Metropolitan Atlanta Rapid Transit Authority, which is 681 Fed 2d 1376. As I said, a 1982 decision. In that case the court holds, and I'm quoting from the Court, at page 1382, "We therefore effectuate the plain meaning of the language in Sections 504 and 505 and conclude that a plaintiff need not establish that the employer received federal financial assistance for the primary purpose of providing employment in order to

have standing. Instead, a plaintiff need only show that the employer received federal financial assistance and that he or she was an intended beneficiary of the assistance," unquote.

The facts in this case demonstrate that the school board of Nassau County received, applied for and received Title I funds for remedial training for students in grades K through 12, although utilized in K through 6, and that the plaintiff was not one of the beneficiaries of those funds, although she was employed by the school board of Nassau County and although they also received federal impact aid, that plaintiff was for all intents and purposes, a third grade teacher and not employed for purposes of Title I or in the Title I program, and did nothing more with respect to the Title I program than any teacher would do with respect to any programs within the school system.

Furthermore, the Court finds that the federal impact funds are not the financial assistance that is referred to in 29 U.S. Code, section 794. Accordingly, the Court finds that the plaintiff has failed to prevail in this case and will direct the clerk of the Court to enter judgment for the defendants in accordance with these findings and conclusions by the Court.

THE CLERK: Yes, your Honor.

THE COURT: Gentlemen, I appreciate your courtesies and your demeanor; and the Court will now be in recess.

THE CLERK: All rise. Court is now in recess.

(Proceedings concluded).

Appendix-D

LAW OFFICES OF
BRIAN T. HAYES, P.A.
245 E. WASHINGTON STREET
MONTICELLO, FLORIDA 32344
904-997-3526

October 28, 1985

Spencer D. Mercer, Clerk
United States Court of Appeals
Eleventh District
50 Spring Street, S.W.
Atlanta, Georgia, 30303-3147

RE: Nassau County School Board
vs. Arline

Dear Mr. Mercer:

Please advise the Court in consideration of the petition for Re-Hearing that the Appellee, should the hearing be granted, will rely on the recently released case of Atascadero State Hospital v. Scanlon, No. 84-351 (U.S. Sup. Ct., June 28, 1985). Since this case was recently decided by the Supreme Court and was undecided at the time of oral argument it was, naturally, not included in the brief of either party. I will furnish the text of the opinion to the court or to your office as soon as I have received it.

Very truly yours,

Brian T. Hayes

BTH:meg

cc: Steven H. Malone

Appendix E

THE WITNESS: Marianne McEuen, MC capital EUEN.

*** MARIANNE McEUEN, MD ***

was-called-as-a-witness on behalf of the Plaintiff, and after having been first duly sworn, then testified as follows:

DIRECT EXAMINATION

BY MR. PADOVANO:

Q. Doctor McEuen, how are you employed?

A. I'm employed by the State of Florida.

Q. All right, And in what capacity?

A. I'm an assistant director of the Community Tuberculosis Control Service of the Department of Health and Rehabilitative Services.

Q. I assume by that that you are a physician?

A. Yes, sir.

Q. Licensed in the State of Florida?

A. That is correct.

Q. How long have you been a physician?

A. In 1956, I've been a physician; yes, sir.

Q. Have you practiced medicine regularly since that time?

A. Yes.

Q. And I take it from your position that your specialty is in the treatment of tuberculosis?

A. That is right.

Q. How long have you been involved in the treatment of the illness of tuberculosis, generally?

A. Since September 1959.

Q. Have you continously worked in that field since that time?

A. That is right.

MR. PADOVANO: The--I would tender Doctor McEuen as an expert. I don't see the need to go into her qualifications in detail unless counsel--

MR. HAYES: I stipulate.

MR. PADOVANO: All right.

BY MR. PADOVANO:

Q. Doctor McEuen, before I get into the testimony about the specifics, I'd like to ask you some general questions about tuberculosis. What--could you tell me, generally, what type of an illness it is and what body systems it affects, if any?

A. It's an illness caused by infectious organism. It can infect any part of the body but most often it affects the lungs.

Q. Okay. And is there a typical symptom?

A. There are symptoms which are considered classical symptoms of tuberculosis, but many people with tuberculosis have minimal or no symptoms, but there are specific symptoms.

Q. What do you generally think of as a symptom?

A. A typical symptoms of tuberculosis are cough, chest pain, weight loss, fever, night sweats and the degree of symptoms depends upon the degree of disease.

Q. You say it could have an effect upon the lungs. Does it have an effect upon the respiratory system in general in most cases?

A. Yes, in most cases.

Q. And is it the kind of illness which has the potential to limit a major life function such as breathing or walking or something such as that?

A. It could, yes.

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Q. Now, during the course of your practice, have you had occasion to either treat or evaluate the plaintiff, Gene Arline?

A. Evaluate, yes.

Q. And could you tell us basically the time that you evaluated her and exactly what you were reviewing.

A. I've been--basically evaluated her since 1959, since I started my--

Q. Let me ask you this: Have you seen her personally off and on during that period of time or--

A. Not as a patient.

Q. I see. But in the sense of evaluating the status of her illness; is that it? I'm not sure of the capacity that you have had in your contact with her and that's why I'm asking you. You were her treating physician?

A. By reviewing records and examining x-rays.

Q. When would you have occasion to do that?

A. When?

Q. Yes, ma'am.

A. Periodically during her treatment and following treatment.

Q. Would that routinely be done, in the course of regular medical checkup, that a patient such as this would--

A. Yes.

Q. --normally do? All right. Now, did you ever see her?

A. Yes.

Q. And how many times did you see her?

A. I saw her in the hearing before the school board and I also saw her in consultation at the Health Department on one occasion.

Q. All right. And are the records kept at the Health Department there; are her records kept at the Health Department?

A. The records are kept at the Health Department in Duval County, but we have records in our office also in Jacksonville.

Q. I see. Is this customarily the case in the unit that you work in? In other words, would you have records of tuberculosis patients which might be duplicated also?

A. Yes.

Q. And how far back does Mrs. Arline's medical record go that you have?

A. May I refer to my records?

Q. Yes, absolutely.

A. Thank you, March 1957.

Q. And then when did you first evaluate her?

A. Me as an individual?

Q. Can you tell that from the records?

A. May 1961.

Q. All right. And how long of a period of time did you monitor the records?

A. The last record we have is June--is May 29th, 1981.

Q. So from '61 to '80 you were regularly--I say regularly --not necessarily frequently, but you were reviewing those records--

A. Yes.

Q. --from time to time? Can you determine from the records whether Mrs. Arline ever had the illness in an acute form in such a degree that it affected her respiratory system?

A. Yes.

Q. That is the case?

A. Yes, she did.

Q. Was she ever hospitalized with the illness?

A. Yes.

Q. And that appears in the records that you are referring to?

A. Yes.

Q. Now, let me ask you: During the course of your evaluation, did it appear to you at any time that there were ever any positive tuberculosis tests?

A. Yes.

Q. And could you summarize for me when those occasions were.

A. Positive?

Q. Yes, from your record.

A. Originally in 1957 and then again in 1977 and in March of 1978 and in November of 1978.

Q. All right. Have you had occasions to--you were, I suppose, familiar with her employment at the time that you were evaluating these records?

A. I was in 1977. I'm not absolutely certain that I was aware of her employment prior to that.

Q. All right. At any time did you have occasion to make any recommendations concerning her continued employment with respect to her--the illness that you have evaluated?

A. Yes.

Q. And when was that and, if you will, please, briefly summarize what it was that you had recommended.

A. It was in February, I believe, when the last culture was reported positive, which I think was February of 1979,

and it was my recommendation at that time that she not continue to teach third grade students.

Q. Now, I don't wish to go into the medical basis for that in detail--if Mr. Hayes wants to, he may--but could you tell us just briefly why you recommended that?

A. Because small children are considered highly susceptible to tuberculosis and because the pattern of relapse suggested that there might be a possibility of further relapses.

* * * * * * * * * * * * * *

So I understand and so the Court understands, tuberculosis is infectious?

A. That's correct.

Q. How would you categorize it--how would you categorize its infectiousness on a scale of one to ten? Is it highly infectious or minimally infectious?

A. I would say it's probably medium infectiousness, if you are comparing it with something like chicken pox, for example, which is very highly infectious. In other words, everybody exposed to tuberculosis doesn't get infected, everybody.

Q. And the infectivity is largely effected through breathing; isn't that correct?

A. That is correct. Exhaling or respiration, coughing, sneezing, breathing.

EDITOR'S NOTE

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Supreme Court, U.S.
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CLERK

CASE NO. 85-1277

IN THE SUPREME COURT OF THE UNITED STATES

THE SCHOOL BOARD OF NASSAU COUNTY, FLORIDA; and CRAIG MARSH, Individually and as Superintendent of Schools of Nassau County, Florida,

Petitioners,

---vs.---

GENE H. ARLINE,

Respondent.

BRIEF OF OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Tuberculosis is a handicap within the meaning of Title 29 U.S.C. 701 (Section 504, Rehabilitation Act of 1973).

2. Whether the receipt of Miniscule Federal Financial Aid by a public employer pursuant to 20 U.S.C. Section 237 is sufficient to invoke jurisdiction under Title 29 U.S.C. 701 et. seq. (Section 504 of the Rehabilitation Act of 1973).

3. Whether the School Board is immune under the Eleventh Amendment to the United States Constitution.

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CITATION TO OPINION BELOW

JURISDICTIONAL GROUNDS

STATUTES INVOLVED

(Respondent accepts Petitioner's presentation of the above sections.)

STATEMENT OF THE CASE

Respondent accepts Petitioners Statement of the Case, except with regard to the testimony of Marianne McEuen, M.D. Dr. McEuen did suggest, as Petitioner indicates, that Tuberculosis could be transmitted to others by breathing, coughing, sneezing, or other respiratory activity. It was her opinion, however, that Respondent could work with older children and adults, and that the risk of infection of those groups was negligible. At the time of Respondent's dismissal, Petitioner had available the recommendation of Dr. McEuen, which stated that Ms. Arline should not continue to teach third grade students because young children are "highly susceptible" to tuberculosis, and because of the possibility of Respondent suffering a relapse. Respondent has suffered three relapses of tuberculosis since her childhood.

REASONS FOR DENYING THE WRIT

ISSUE 1: WHETHER TUBERCULOSIS IS A HANDICAP WITHIN THE MEANING OF TITLE 29 U.S.C. 701 (Section 504, Rehabilitation Act of 1973).

(i) The issue is premature for decision by this Court

There is presently no judicial decision from the federal courts of appeals other than the decision below which directly addresses whether the term "handicapped individual" includes those afflicted by a contagious disease. The lack of the decisional law on this subject suggests several important reasons for the Court to delay its involvement. "One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions on (federal law questions) among the federal court of appeals." Stern & Gressman, Supreme Court Practice, p. 265 (5th ed. 1971). Moreover, the Court benefits from hearing a wide variety of views of an issue. Respondent submits that, in order to allow time for the arguments on all sides to develop, the Court should exercise its discretion and deny the Writ.

There is no conflict among the lower federal courts on what constitutes a "handicapped individual" within section 504 of the Act. All courts have given effect to the plain meaning of the statutory test of 29 U.S.C. §706(7)(B), which allows any person who has "a physical or mental impairment which substantially limits one or more... major life activities" to seek redress under section 504. Petitioner concedes that the courts have construed the term "impairment" to encompass a wide variety of physical and mental afflictions (Pet. Br. at 10), and does not dispute the Respondent's affliction substantially limits her ability to work. Yet Petitioner's brief fails to provide case or statutory authority upon which the court below could justify a departure from clear statutory language and established legal principles. The absence of any such authority in Petitioner's brief for excluding certain "unpopular" afflictions from the coverage of the Rehabilitation Act is itself evidence that the

issue presented is premature for consideration by this Court. Respondent respectfully submits that the Court await further developments in the lower courts to determine whether Petitioner has presented an issue of national importance. See Stern & Gressman at 284.

(ii) The issue is of minor importance in the overall structure of the law.

As noted above, the question of what constitutes a "handicapped individual" is not a contentious one. In many cases, the parties simply stipulate to the issue. See, e.g. Strathie v. Dep't of Transporation, 716 F.2d 227, 231 (3d Cir. 1983) (hearing impaired bus driver); Bentivegna v. United States Dep't of Labor, 694 F.2d 688 (9th Cir. 1982) (diabetic construction worker.

Petitioner suggests that the issue of whether an individual who suffers from a contagious disease is "handicapped" is an important one because of the employer's interest in protecting the health and safety of employees and clients. (Pet. Br. at 15, 18) Although many of the cases arising under section 504 involve consideration of the employer's interests along with those of qualfied handicapped individuals, none suggest that this weighing of interests should take place when determining if the plaintiff is handicapped. In many Section 504 cases, once a plaintiff shows that an employer denied him employment because of his physical condition, the burden of persuasion then shifts to the employer to show that its requirements are sufficiently "job-related" to justify the denial. See Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981); Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983). See also 29 C.F.R. 1613.702 et seq. In other cases, after the plaintiff makes his prima facie case, the employer must then show that, despite its duty to make "reasonable accommodations" for "otherwise qualified" handicapped persons, such accommodations were impossible or would impose an undue hardship. See Southeastern Community College v. Davis, 442 U.S. 397, 60 L.Ed. 2d 980, 99 S.Ct. 2361 (1979); Strathie, supra. Clearly, the framers of the

Act did not intend that persons who are dismissed from employment because of disease should be denied such opportunities to challenge their employer's justifications in court. In enacting Section 504, Congress stressed the importance of the evenhanded treatment of handicapped individuals. Southeastern, 99 S.Ct. at 2369.

Petitioner contends that the 1978 Amendments to the Act concerning alcoholism and drugs indicate Congress' intent to exclude from Section 504 individuals who present "unavoidable health risks" because they are not "handicapped individuals." (Pet. Br. at 17.) Yet Congress has never indicated that such risks are to be considered when determining who is "handicapped." Courts typically analyze the risks faced by the handicapped individual and by others in their environment when determining whether program requirements are discriminatory, or when considering whether "reasonable accommodations" can be made. See New York State Assoc. for Retarded Children, Inc. v. Carey, 612 F.2d 644 (2d Cir. 1979) (plan to separate carriers of hepatitis B from other school children is discriminatory under 504 where health hazard not shown to be more than remote possibility); Strathie, supra (remand to determine whether accommodations to hearing-impaired bus driver could eliminate all appreciable risks to passengers' safety); Duran v. City of Tampa, 451 F.Supp. 955 (M.D. Fla. 1978) (refusal to hire because of epilepsy discriminatory under Section 504; Gladys J. v. Peraland Ind. School District, 520 F.Supp. 869 (S.D. Tex. 1981) (refusal to place schizophrenic in residential school nondiscriminatory under Section 504 because of "striking out aggressively" and other maldaptive behaviors). The holdings of the above cases were reached after careful consideration of suggested measures to protect the health and safety of handicapped individuals and all those with whom they come into contact. To suggest, as Petitioner does, that Congress in 1978 sought to remove such protections from individuals who present potential risks to others due to their handicap, is to ignore not only the purposes of the Rehabilitation Act, but established case law as well.

(iii) Whether or not the decision below is correct, Petitioner's argument is witout merit.

In its brief, Petitioner distorts the holding of the Eleventh Circuit Court of Appeals with respect to "reasonable accommodations." According to Petitioner, the court below held that even if Respondent were not "otherwise qualified" for her teaching position, her employer might nevertheless be required to accommodate her. (Pet. Br. at 15.) From this premise, Petitioner concludes that the Court of Appeals' concept of reasonble accommodation would require employers to unreasonably compromise the safety of others. (Pet. Br. at 18).

Petitioner has misinterpreted the holding of the Eleventh Circuit and attributed to it a significance well beyond its intended limits. The court below did not hold that the School Board must compromise the health of employees or students in order to accommodate Respondent. It simply remanded for fact-finding to determine whether she was "otherwise qualified" and, if so, whether reasonable accommodations could be made. Arline v. School Board of Nassau County, 772 F.2d 759, 765 (11th Cir. 1985). Although the court did suggest in dicta that reasonable accommodations might include placement "in another position teaching less susceptible individuals," the court did not suggest that, under those circumstances, Respondent need not be "otherwise qualified." By raising the possibility of assigning Respondent to another position, the Eleventh Circuit merely encouraged a flexible approach to accommodating a qualified, handicapped individual. This dicta is consistent with tha of the Supreme Court; see Southeastern, 99 S.Ct. at 2370 ("situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory").

Petitioner also contends that "whether an individual is to be considered 'qualified' under the Act depends on whether such individual can, with or without reasonable accommodation," perform the essential functions without endangering health or safety (citing Prewitt, supra) (Pet. Br. at 12-13; emphasis added). Prewitt, however, merely affirms the established proposition that an employer need not hire a handicapped

individual who cannot perform without accommodation. 662 F.2d at 307. Nowhere does the Prewitt court (or any court) state that a handicapped individual must be qualified in all respects even without reasonable accommodations.

Petitioner's arguments as to whether Respondent is "otherwise qualified" and as to whether "reasonable accommodations" can be made raise issues of fact not reached by the Court of Appeals. These arguments should be addressed to the district court on remand.

(iv) The court below reached the correct result after full consideration of the issues.

The Court of Appeals decided that Respondent was a "handicapped individual" after finding that "neither the regulations nor the statutory language give any indication that chronic contagious diseases are to be excluded from the definition of 'handicap'" and that "there is not a scintilla of evidence that Congress had any intention of (creating an exemption)." 772 F.2d at 764. The court also recognized that creating an exemption for those afflicted with contgious disease would defeat Congress' intent to "encourage recipients of federal funds to make decisions about the employability of those with physical or mental impairments only after a careful weighing of the costs involved in accommodating the tasks at issue to their capabilities." Id.

This refusal to carve a judicial exemption into the nondiscrimination provision of the Rehabilitation Act of 1973 is certainly consistent with the pronouncements of the legislature. In enacting and amending Section 504, Congress "made a commitment to the handicapped, that, to the maximum extent possible they shall be fully integrated into the mainstream of life in America." S.Rep. No. 890, 95th Cong., 2d Sess. 39 (1978) (emphasis added).

Petitioner argues that the Act requires an employer to "accommodate the requirements of a job to a handicapped

individual's abilities" and implies that unless an employee's abilities are the basis of the employer's action, the employer has no obligations under Section 504. (Pet. Br. at 13-14.) This reading of the Act is contrary to legislative history, which consistently demonstrates congressional intent to prevent such narrowing constructions of Section 504. See S.Rep. No. 1297, 93rd Cong., 2d Sess., reprinted in 4 U.S. Code Cong. & Ad. News 6414 (1974) (definition of "handicapped individual" expanded to reach those persons outside the employment arena and to reach those not involved with vocational rehabilitational programs.)

There is an unbroken line of case authority which supports the Eleventh Circuit's reading of congressional intent. In Consolidated Rail Corp. v. Dorrane, 104 S.Ct. 1248, 1255 (1984), the Supreme Court noted the remidial nature of the Rehabilitation Act and held that its provisions are to be accorded and broad construction to effectuate the Act's purposes. The court in Strathie, supra, noted that broad judicial deference to administrators would undermine Congress' intent to sterotypes or generalizations not deny handicapped individuals equal access to federally-funded programs. See also Bentivegna v. United States Dep't of Labor, 694 F.2d 619 (9th Cir. 982) (Act mandates "significant accommodations for the capabilities and conditions of the handicapped") (emphasis added).

The result reached by the Eleventh Circuit was both fair and farsighted. If the court had followed Petitioner's recommendation and interpreted Section 504 to exclude persons with contagious diseases, its precedent would potentially have led to massive litigation over what constitutes "contagious." Meanwhile, the focus of program administrators and courts would have been directed away from the key issue: whether the qualified handicapped individual can be reasonably accommodated to work or learning environment.

ISSUE 2: WHETHER THE RECEIPT OF FEDERAL FINANCIAL AID BY A PUBLIC EMPLOYER PURSUANT TO 20 U.S.C. SECTION 237 IS SUFFICIENT TO INVOKE JURISDICTION UNDER TITLE 29 U.S.C. 701 et seq. (Section 504 of the Rehabilitation Act of 1973).

(i) The issue is premature for decision by this Court.

As with respect to the definition of "handicapped individual" under section 504, Petitioner proposes an interpretation of "federal financial assistance" under section 504 which as of yet has no support in any federal court of appeals. By suggesting that federal aid might reach such a miniscule level such as to no longer constitute "federal financial assistance" under section 504, Petitioner presents to the Court a novel and perhaps interesting issue. However, Respondent submits that the Court should reserve its jurisdiction for those issues which the lower courts have had an opportunity to address and which have since given rise to important legal problems. See Stern & Gressman, Supreme Court Practice, at 284.

Petitioner contends that, by holding a recipient of impact aid to be covered by section 504, the Court of Appeals initiated a "dramatic expansion" of the concept of federal financial assistance away from previous decisions. (Pet. Br. at 19.) Yet the significance which Petitioner attaches to the holding below is contrived. No court has recognized a theory by which a certain amount of federal funding would be insufficient to give rise to section 504 coverage. The Court of Appeals' holding would only have been "dramatic" if the court had departed from established legal principles and recognized such a theory.

Because the court recently clarified the meaning of "federal financial assistance" under section 504 of the Rehabilitation Act in Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984), ruling on this question of law today would be duplicative and wasteful of the Court's limited resources. In Darrone, 465 U.S. 624 (1984), the Court held that an action under section 504 must

be brought against the specific "program or activity" receiving federal funds, but that there is no implicit requirement under section 504 that the funds be "primarily intended" to promote employment. This holding indicates that attempts to read limitations into the meaning of the term "federal financial assistance" which are not apparent on its face will be rejected. See Arline, 772 F.2d at 76 n.9. Since the language of section 504 provides no foundation for an implicit requirement of "something more than miniscule" aid, Respondent submits that the Court should refrain from exercising its discretionary jurisdiction in this case.

(ii) Whether or not the decision below is correct, Petitioner's argument is without merit

Petitioner relies on the Supreme Court's holding in Grove City College v. Bell, 465 U.S. 555 (1984), for the proposition that funds earmarked for one program which find their way into a budget governing a "separate and distinct" program do not give rise to section 504 coverage of the latter program. (Pet. Br. at 19-20.) Regardless of whether Petitioner's interpretation is correct, Grove City is inapplicable to the present factual circumstances. The Court in Grove City carefully distinguished nonearmarked direct grants (such as the impact aid in the present case) from th- grants of financial aid to students which were under its consideration. Grove City, 104 S.Ct. at 1221.

Despite Petitioner's repeated insistence that the "program-specific" requirement of Grove City and Darrone precludes section 504 coverage in this case, Petitioner fails to delineate the specific program in which the impact aid was directed. Petitioner suggests that impact aid is "compensatory" in purpose and therefore not federal financial assistance at all; however, this contention provides scarce support for its argument that Respondent was unconnected with the specific program receiving federal assistance.

(iii) The court below reached the correct result after full consideration of the issues.

The Eleventh Circuit correctly concluded that the present case does not fall within the line of cases involving obligatory payments made by the federal government as market participant. The case of Hingson v. Pacific Southwest Airlines, 743 F.2d 1408 (9th Cir. 1984), cited by Petitioner, succinctly states the rule that when the federal government compensates an entity for goods or services provided, such expenditures constitute "federal financial assistance" only when a subsidy is involved. This distinction between obligatory payments and subsidies has also been recognized by the Supreme Court. In Darrone, supra, the Court noted that, in light of government payments in excess of fair market value, federal financial assistance had been awarded. 104 S.Ct. at 1255 n.19. In the present case, the federal government was clearly under no obligation to deliver impact aid to Petitioner; by providing such a subsidy, it clearly placed Petitioner wtihin Section 504 coverage.

The Eleventh Circuit's holding that the relevant "program" with regard to nonearmarked general revenue funds was the entire school district, was consistent with statutory and case law. The legislative history of section 504 indicates that Congress intended to provide the most assistance and protection for the handicapped that the expenditure of federal dollars could provide. See Cong. Rec. 5880-83 (1973) (statement of Senator Cranston). Although there is limited case law on the subject of nonearmarked funding and section 504's "program-specific" requirement, at least one court has held that where the plaintiff's salary is paid from the same source into which nonearmarked federal funds are deposited, plaintiff's program is presumed to have received "federal financial assistance" within the meaning of section 504. Bradford v. Iron County C-4 School District, 36 FEP Cases 1296, 1299 (E.D. Mo. 1984) (plaintiff held to have participated in program covered by section 504 where defendant unable to show that program at issue did not utilize federal funds). To require Respondent to trace federal funds through Petitioner's general account would impose an "impossible

burden of tracing money that is virtually untraceable" upon the aggrieved party. 772 F.2d at 763. Such a result would hardly comport with the intent of Congress to maximize protections for the handicapped.

ISSUE 3: WHETHER THE SCHOOL BOARD IS IMMUNE UNDER THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

(i) Petitioner's argument is wholly without merit.

In support of its contention that a district school board in Florida is a direct branch of the State of Florida, Petitioner cites Adkins v. Duval County School Board, 511 F.2d 690 (5th Cir. 1975). In Adkins, the court described the localized funding scheme for school boards in Florida and, unable to distinguish a Florida school board was not a "person" within the meaning of section 1983. In Campbell v. Gadsden County District School Board, 511 F.2d 690 (5th Cir. 1976), also cited by Petitioner, the court stated that "our analysis (in Adkins) of the nature of Florida school boards in the context of determining their similarity to municipalities is sufficient to convince us that they are not the type of entities which are sheltered by the Eleventh Amendment." Petitioner cites no cases which indicate that Florida school boards are to be treated as the state for purposes of the Eleventh Amendment, nor does it provide any support for its contention that this issue is a "question of fact" which must be resolved on a case-by-case basis. (Pet. Br. at 24.) It is well-established that locally-funded governmental entities, such as Petitioner, are not entitled to Eleventh Amendment immunity. Edelman v. Jordan, 415 U.S. 651 (1974). Since Petitioner provides no basis in law or fact for departing from this principle in the present case, Respondent submits that the Court should deny the writ of certiorari.

CONCLUSION

There is currently no legal authority, express or implied, for the narrowed construction of section 504 which Petitioner

proposes. The Court should decline to exercise its discretionary jurisdiction so that the issues presented by Petitioner may be further tested and developed in the lower courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition was furnished by U.S. Mail to Brian T. Hayes, 245 E. Washington Street, Monticello, Florida 32344; and to JOHN D. CARLSON, 1030 East Lafayette Street, Tallahassee, Florida 32301, this 26 day of February, 1986.

GEORGE R. RAHDERT, ESQUIRE

Supreme Court, U.S.
FILED
MAR 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 85-1277

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE SCHOOL BOARD OF NASSAU COUNTY, FLORIDA; and CRAIG MARSH,
Individually and as Superintendent of Schools of Nassau County, Florida,

Petitioners,

---*vs.*---

GENE H. ARLINE,
Respondent.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS REPLY BRIEF

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Appendix B: *Legal Status Of An AIDS Infected Person;* Excerpt From: (9th Annual Local Government Law In Florida Seminar), (March, 1986), p. 8.10.

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REPLY ARGUMENT

Pursuant to Rule 22.5, Supreme Court Rules, Petitioners reply to the Brief of Opposition filed by Respondent.

A. In her Brief, Respondent asserts that the issue in this case is premature and not ripe for consideration by this Court. Petitioners suggest that the matter is not only ripe but a series of cases and legislative enactments have already gone forward based on the decision of the 11th Circuit.

To wait for diverse opinions from various Circuit Courts or legislative bodies would only exacerbate confusion in an area of significant national concern. Specifically, since this decision has been rendered, it has been widely interpreted as precedent for AIDS cases. Recently, in an article appearing in the March, 1986 issue of the "Employment Relations Bulletin" (See Appendix A for full text), it was reported that the Executive Director of the Florida Commission on Human Relations has ruled that AIDS is a handicap within the meaning of the Florida Law. This journal reported (page 4) as follows:

> "In reaching his decision, Human Relations Commission Executive Director Donald Griffin found that:
>
> > 'Based upon the plain meaning of the term "handicap" and the medical evidence presented, an individual with acquired immune deficiency syndrome is within the coverage of the Human Rights Act of 1977 in that such an individual

> "does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties.'
> In support of this finding, Griffin cited *Arline v. School Board of Nassau County,* 772 F.2d 759 (11th Cir. 1985), which the *"CERL Bulletin"* previously noted could be the basis for a finding that AIDS is a handicap. That case involved the finding that tuberculosis, a communicable disease, was a handicap under the definition of the federal Rehabilitation Act of 1973 (See *Disease is Handicap Under Rehabilitation Act; May Impact on AIDS,* 21 *"CERL Bulletin"* 3 (December, 1985)). Griffin also found that Broward County had failed to establish that a requirement that a person not have AIDS is a bonafide occupational qualification (BFOQ) which would justify discrimination under the statute."

Additionally, the Florida Legislature is now considering legislation to define AIDS as a handicap, once again citing the *Arline,* supra, case as was reported in the lecture outlines of the *9th Annual Local Government Law in Florida Seminar.* (See appendix B) In that proposed legislation the case herein sought to be reviewed is cited as direct authority.

Certainly, Petitioners suggest, this case, although a Tuberculosis case, has become precedent as suggested in their Brief. (See page 18 of Petitioner's Brief) Therefore, they suggest that the time is now for the Court to accept this significant case and determine directly and clearly that infectious diseases are not "handicaps" within the meaning of Section 504, Rehabilitation Act of 1973.

B. Since this matter was originally briefed the issue of accomodation of a handicapped worker has been con-

sidered and reported in a District Court case in Maryland. In *Carty v. Carlin,* N-84-4565 D. Maryland (12/85), the Honorable Edward S. Northrup determined in construing Section 504 of the Rehabilitation Act of 1973, that an employer's duty to accomodate is limited to the employee's current job and does not include the right to a transfer to another job if accomodation in the current job is not feasible, even if the employee can perform the other job. This case is significant, Petitioners suggest, because the issue before this Court also is concerned with the Respondent's claims of entitlement to be transferred to a job where she would come in contact with "less susceptible individuals".

Petitioners now argue that the *Carty,* supra, case and its rationale, has direct bearing on the issues in this case and should be adopted by this Court. Although the *Carty,* supra, case appears to be one of first impression, it clearly demonstrates the confusion and uncertainty currently being experienced by Federal Courts throughout the country.

CONCLUSION

Because of the immediate significance of the issue in this case, Petitioners suggest that certiorari is proper and appropriate to resolve the issue herein raised.

Respectfully Submitted

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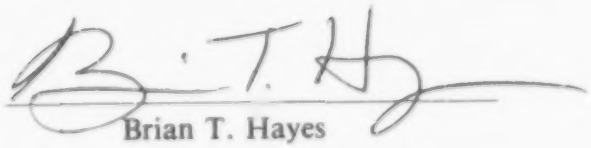
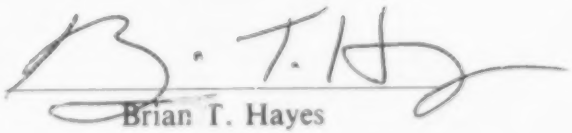
By 
Brian T. Hayes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioners Reply Brief For Writ Of Certiorari was furnished by U. S. mail to George K. Rahdert, Esquire, 233 Third Street North, St. Petersburg, Florida 33701, Attorney for the Respondent this 28th day of March, 1986.



Brian T. Hayes

Appendix A

AIDS RULED HANDICAP IN FLORDA; NATIONAL EDUCATION URGED

In an important decision with possible national repercussions, the Executive Director of the Florida Commission on Human Relations has ruled that the disease AIDS is a handicap within the meaning of Florida law and that persons with the disease are thus protected from discrimination because they have it. The investigatory determination in the case of Todd Shuttleworth, a policy analyst for the Broward County Office of Budget and Management Policy until he was fired in September 1984 after his employer discovered that he had AIDS, was hailed by gay rights activists across the nation as an important victory.

Shuttleworth's employer never denied that he was discharged because he had AIDS. Instead, the county said that it was acting on the basis of a document prepared by the Florida Department of Health and Rehabilitative Services (HRS). The HRS document recommended that health care professionals who treated AIDS patients should avoid contact with those persons under certain circumstances, such as if the employee takes steroids daily, if they are pregnant, if they have certain known immune deficiency diseases, or if they have recently received chemotherapy.

In reaching his decision, Human Relations Commission Executive Director Donald Griffin found that:

> Based upon the plain meaning of the term "handicap" and the medical evidence presented, an individual with acquired

> immune deficiency syndrome is within the coverage of the Human Rights Act of 1977 in that such an individual "does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties."

I. support of this finding, Griffin cited *Arline v. School Board of Nassau County,* 772 F.2d 759 (11th Cir. 1985), which the *CERL Bulletin* previously noted could be the basis for a finding that AIDS is a handicap. That case involved the finding that tuberculosis, a communicable disease, was a handicap under the definition of the federal Rehabilition Act of 1973 (*See Disease is Handicap Under Rehabilition Act: May Impact on AIDS,* 21 *CERL Bulletin* 3 (December, 1985)). Griffin also found that Broward County had failed to establish that a requirement that a person not have AIDS is a bonafide occupational qualification (BFOQ) which would justify discrimination under the statute.

Griffin stated in conclusion that he was:

> mindful of the serious and important concerns of the employer, the other employees and the public. Based upon my review of this case, I do not find that Respondent was acting in bad faith when it made the decision to terminate Complainant; nevertheless, there is an absence of evidence to show with any reasonable probability that AIDS can be transmitted by casual contact that commonly occurs in the workplace.

Griffin futher noted that; "In so holding, I specifically refrain from resolving issues involving employment

decisions to reassign or alter the working conditions of employees with AIDS or decisions involving employees with transmissible infections." Also left unresolved are important issues concerning whether the Act covers persons in high risk groups or those who have tested positive for exposure to the virus but have not developed AIDS.

It is important to note that Broward County may still appeal the Executive Director's investigatory decision to the full Commission and can also appeal it in circuit court.

Shuttleworth's attorney, Larry Corman, said that the decision "sets a statewide precedent. It puts every employer in the State of Florida on notice that to discriminate solely because that individual has contracted AIDS constitutes an unlawful employment procedure which violates Florida statutes and subjects employers to liability for damages and attorney's fees." Corman has ask for $5 million dollars in compensatory damages for Shuttleworth.

Shuttleworth himself, reached in San Francisco where he now lives, was quoted in the *Miami Herald* as saying that the decision "is great news." He said that he was "never really that bitter, but I think the county was stupid. The more I see the evidence and statistics on AIDS, the more I conclude that people who think it's casually transmitted are just real dumb."

Ron Najman, spokesman for the National Gay Task Force in New York, was quoted by the *Herald* as saying

that "[w]e're very pleased with the decision" and that the "desire to fire people or throw them out of their apartments or fumigate their belongings — all this nonsense is based on the belief that AIDS is easy to catch. That's false."

Concern about the disease has been much in evidence across the nation in recent weeks. In Congressional testimony before the House Government Operations Subcommittee on Intergovernmental Relations and Human Resources, witnesses related tales of discrimination in Washington state, particularly Tacoma. Linda Taylor, director of the Seattle Office for Women's Rights, said that because of Seattle's strong antidiscrimination laws in employment, housing, and provision of city services to various protected groups, including gays, that many persons with AIDS or AIDS Related Complex (ARC) were moving to that city. Taylor's remarks were reported in the *Government Employee Relations Report* (23 *GERR* 1779 (1985)).

In San Francisco, the San Francisco AIDS Foundation has announced that more than half of the cost of an AIDS education package aimed at relieving the fears of employers and employees has been underwritten by area corporations, including Levi-Strauss & Co., Inc. and BankAmerica. The package will consist of written materials in English and Spanish, a videotape, and an educational program manual.

Back in Florida, another bill regarding the treatment of teachers and students with AIDS has been filed in the Florida Legislature. House Bill 137, introduced by Rep. Javier Souto (R-Miami), would allow the Florida

Department of Education to test district, private elementary, or secondary school teachers and students if it was found that there was "probable cause" that they had AIDS. The bill would also require infected students to be taken out of the general school population, but would allow them to remain in school and be taught by teachers with AIDS. Local school boards would also be empowered to terminate, with pay, teachers found to be infected with the disease. An earlier bill concerning AIDS in Florida Schools was filed by Sen. Don Childers (D-West Palm Beach) (*See CDC, NEA Issue AIDS Guidelines,* 22 *CERL Bulletin* at 2 (January, 1986)).

Further developments in the AIDS crisis, particularly with regard to Florida and how the workplace is affected, will be covered in future issues of the *CERL Bulletin*.

A-1 Excerpt from: *EMPLOYMENT RELATIONS BULLETIN,* Center for Employment Relations & Law, College of Law, Florida State University, Tallahassee, FL 32306; (March 1986, No. 24), p.4.

Appendix B

C. Legal status of an AIDS infected person

1. If AIDS is defined as a handicap, there can be no discrimination.

   a. If AIDS is a handicap, there can be protection by both federal and state antidiscrimination laws.

   b. In *Arline v. Nassau County School Board,* F.2d 1759 (11 Cir. 1986), a teacher with T.B. was declared to be handicapped under the Federal Rehabilitation Act.

   c. Based upon that decision, the Florida Commission on Human Relations has indicated that a city budget director with AIDS was handicapped. This case has not been reputed nor has it been reviewed judicially.

   d. If a handicap designation is upheld, employees would be protected by S.760,F.S. as well as the Florida constitution.

   e. Likewise students would be protected under the Federal Education For The Handicapped Act as well as the Florida constitution.

D. Pending Legislation

1. Senate Bill-44 (Fla.) This bill would:

   a. Require HRS to inform school boards of any student or employee with AIDS

   b. Authorizing school boards to test for AIDS

   c. Requiring segregation of students

   d. Requiring no employment of AIDS infected person in a cafeteria or food service.

2. Should AIDS be declared a handicap, Senate Bill-44 would probably be unenforcible as against federal and state law.

[A-B]Excerpt From: *9th ANNUAL LOCAL GOVERNMENT LAW IN FLORIDA SEMINAR,* The Florida Bar Continuing Legal Education Committee And The Local Government Law Section; (March, 1986), p.8.10.

(4)

SUPREME COURT OF THE UNITED STATES

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA AND CRAIG MARSH, INDIVIDUALLY AND AS SUPERINTENDENT OF SCHOOLS OF NASSAU COUNTY, FLORIDA *v.* GENE H. ARLINE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85–1277. Granted April 21, 1986

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is granted, limited to Question 1 presented by the petition. In addition, the parties are requested to brief and argue the following question:

> "Whether one who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being 'otherwise qualified' for the job of elementary-school teacher, within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794?"

JUSTICE STEVENS, dissenting.

The Court of Appeals remanded this case for further proceedings, and concluded its opinion as follows:

> "In this case, the district court made no findings resolving the numerous factual disputes as to whether the risks entailed in retaining Arline in her elementary school position precluded her from having the necessary physical qualifications for the job, whether the same would be true if she were transferred to a position teaching less susceptible individuals, or whether the costs involved in accommodating her would place undue burdens on the school system. Rather, it simply concluded that the school board was exempt from any duty whatever to weigh the actual costs and risks involved in accommodating Arline because of an overriding 'duty to the public it

xpp

> serves.' Section 504 by its existence establishes that such a duty cannot be used to shield any entity from liability for making decisions which 'arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program.' *Southeastern Community College*, 442 U. S. at 412, 99 S. Ct. at 2370. We therefore remand this case for further findings as to whether the risks of infection precluded Mrs. Arline from being 'otherwise qualified' for her job and if so whether it was possible to make some reasonable accommodation for her in that teaching position, in another position teaching less susceptible individuals, or in some other kind of position in the school system." App. A. to Pet. for Cert (footnotes omitted).

In my opinion, it is inappropriate for this Court to direct the parties to present argument on the "otherwise qualified" issue before the District Court has an opportunity to make the findings ordered by the Court of Appeals. It is especially inappropriate because petitioner did not seek review on that issue. Accordingly, I respectfully dissent.